In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-673

CLARENCE JONES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the evidence was insufficient to support his conviction, that a statement made after trial by the Assistant United States Attorney required the district court to declare a mistrial *sua sponte*, and that the court abused its discretion in refusing to permit defense counsel to examine the presentence report.

After a jury-waived trial in the United States District Court for the Southern District of Texas, petitioner was convicted of importation of narcotics into the United States, possession of narcotics with intent to distribute,

and conspiracy to commit the substantive offenses, in violation of 21 U.S.C. 952(a), 963, and 841(a)(1).[1] He was sentenced to concurrent terms of ten years' imprisonment and five years' special parole on each of the three counts, and fined $5,000 on Count 1. The court of appeals affirmed (Pet. App. A).

The evidence, when viewed in the light most favorable to the government, *Glasser* v. *United States*, 315 U.S. 60, 80, showed that on May 12, 1973, Raoul Perez (a co-defendant who testified for the government), Jennie Santiago (an unindicted co-conspirator), and petitioner flew from New York City to Mexico City, at petitioner's expense, for the purpose of buying cocaine to bring into this country. Perez testified that on May 15 the three flew to Nuevo Laredo, where Perez met with co-defendant Rafael Aleman[2] and arranged for the purchase of one pound of cocaine (Tr. 7-10). Petitioner gave Perez $10,000 to complete the deal and returned to New York City. Aleman delivered twelve ounces of cocaine to Perez in Laredo, Texas, receiving payment from the money petitioner had given Perez (Tr. 11). Perez and Santiago then went to the airport at San Antonio, where they were arrested (Tr. 4-12, 51-56).[3] Perez agreed to cooperate with narcotics agents and went on to New York City, where he met petitioner and delivered a substitute package containing part of the cocaine. Petitioner was arrested and the substitute package recovered from his waistband (Tr. 13-15, 57-60).

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[1]The court acquitted petitioner on a fourth count, which alleged distribution of the narcotics.

[2]Aleman was a fugitive at the time of trial.

[3]The government is lodging with the Court a copy of the trial transcript (Tr.).

Santiago testified that she learned for the first time in Mexico City (from conversations between petitioner and Perez) of their intention to buy cocaine. She corroborated the testimony of Perez concerning their subsequent movements (Tr. 41-47).

1. Petitioner concedes that the testimony of an accomplice need not be corroborated in order to sustain a conviction, *Caminetti* v. *United States,* 242 U.S. 470, but contends that the conviction here was improper because supported by the testimony of accomplice Perez, who had been promised immunity and whose guilt was certain, whereas the guilt of petitioner was "far from certain" (Pet. 9-18). However, the trial court's finding that petitioner was guilty beyond a reasonable doubt was sustained by the testimony of both Perez and Santiago, as well as discovery on petitioner's person at the time of his arrest of the package containing a portion of the narcotics. Petitioner was free to challenge Perez's testimony on cross-examination and to bring out any bias Perez may have had against petitioner.

2. After petitioner had been convicted, government counsel requested the court to incarcerate petitioner pending sentence, expressing apprehension over Jennie Santiago's safety (Pet. 3-4, 19-20). It was entirely proper for the government to be concerned about the safety of its witness. Moreover, because the trial already had been completed, it would have been inappropriate for the court *sua sponte* to declare a mistrial. If petitioner believed that the government's expression of concern prejudiced him, he was at liberty to demonstrate to the court that the government's concern was unfounded. As the court below stated (Pet. App. A-2 to A-3):

> The prosecutor's remarks that are alleged to be prejudicial were made after [petitioner] was found guilty. No substantial rights of [petitioner] were affected by them. Under the circumstances, any error was harmless.

3. Finally, petitioner urges that there is a conflict among the courts of appeals concerning the scope of a district court's discretion to release or withhold presentence reports from defendants' counsel. The district court denied without comment petitioner's request to inspect his report, although it did question petitioner regarding the accuracy of his previous arrest record (Pet. 22).

Presentence reports are documents that Rule 32(c)(2), Fed. R. Crim. P., does not make automatically available to a defendant. *Gregg* v. *United States*, 394 U.S. 489, 492; *United States* v. *Schrenzel*, 462 F.2d 765, 775 (C.A. 8), certiorari denied, 409 U.S. 984; *United States* v. *Dace*, 502 F.2d 897 (C.A. 8), petition for a writ of certiorari pending *sub nom. Schneider* v. *United States*, No. 74-491. We rely upon our memorandum in opposition in *Schneider*.[4] As we said there:

> Petitioners in effect urge a change in the rules making it routine practice to turn presentence reports over to the defendant. Indeed, the recently proposed amendments to the Rules of Criminal Procedure transmitted to Congress on April 22, 1974, would, in proposed Rule 32(c)(3), make disclosure of the presentence report to the defendant mandatory upon request except in a few well-defined circumstances. But those amendments have not yet been approved. [Memo in opp. 4.]

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[4]We are providing petitioner with a copy of the Memorandum in Opposition in that case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1975.